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ABSTRACT

This essay traces the history of the U.S. Constitution's First Amendment freedoms of assembly and petition--the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These freedoms had their origins in English law and were included in a number of colonial and then state constitutions prior to their incorporation into the Bill of Rights. The limits of the freedoms of assembly and petition and how the Supreme Court has defined such limits are discussed. The essay raises the question of how to balance the freedoms provided by the First Amendment with the harm that is done by persons claiming to exercise their First Amendment rights when these rights are used to assault the beliefs and sensitivities of vulnerable minorities--racial, ethnic, sexual, religious or whatever they may be. (DB)

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THE FIRST AMENDMENT FREEDOMS OF ASSEMBLY AND PETITION: HISTORY, PHILOSOPHY, AND CONTEMPORARY ISSUES

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The First Amendment's "right of the people peaceably to assemble, and to petition the Government for a redress of grievances" has, in combination with Section I of the Fourteenth Amendment, protected individuals in the United States against abridgment of these fundamental freedoms by either the federal or state governments. These fundamental freedoms, of course, pre-date the United States Constitution, having their origins in our English legal heritage and the colonial governments of British North America. The English Bill of Rights of 1689 affirmed "That it is the right of the subjects to petition the King and all commitments and prosecutions for such petitioning are illegal." Forty-eight years earlier, in 1641, Section 12 of the Massachusetts Body of Liberties guaranteed freedom of speech and petition at public meetings, so that "Every man . . . shall have liberty to . . . present any necessary motion, complaint, petition, Bill or information. . . ."

During the founding period of the United States the freedoms of assembly and petition were included in several state constitutions, including the acclaimed Massachusetts

Constitution of 1780, which greatly influenced the federal Constitution of 1787. By the 1780s, the twin freedoms of assembly and petition were recognized as part of the American consensus on the constitutional rights of individuals. Therefore, it would have been unusual if James Madison had not included them in his proposal to the first federal Congress, June 8, 1789, to add "the Great Rights of Mankind" to the Constitution.

Madison presciently said in his June 8th, 1789 address to Congress that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution." And so it has been, especially in the twentieth century, as the freedoms of assembly and petition, along with other fundamental constitutional rights of the people, have been protected by an independent federal judiciary using its power of judicial review. First Amendment freedoms have been expanded through judicial interpretation across two hundred years of constitutional history in the United States; and today, the right of assembly also includes the right of association. Furthermore, the rights of assembly and petition are indisputably protected by the "due process" clause of the Fourteenth Amendment against infringement by the states.

If decisions of the independent federal judiciary have been a critically important part of the history of constitutional rights, so have the actions of responsible citizens. Constitutional rights are merely "parchment barriers" -- as Madison once said -- unless individuals bring cases to the federal judicial system to protect their rights. The satisfactory enforcement of legal decisions about rights also depends upon a supportive citizenry that will hold public officials accountable as guardians of fundamental freedoms, such as those in the First Amendment. This kind of responsible citizen action is necessary to make the machinery of government work for the good of the people.

The freedoms of assembly and petition, like other constitutional rights, have limits. Justice Louis Brandeis wrote in 1927 (Whitney v. California): "Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." These limits must be justified, as Brandeis emphasized, by a compelling public interest. "Only an emergency can justify repression," said Brandeis. "Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore

always open to Americans to challenge a law abridging free speech [petition] and assembly by showing that there was no emergency justifying it."

Citizens of a constitutional democracy will forever be challenged by issues about what does or does not constitute an "emergency justifying" a particular limitation upon freedom of expression. They must respond, case-by-case, to this generic question: At what point, and under what circumstances, should majority rule be limited by the higher law of the constitution in order to protect fundamental freedoms and rights of individuals in the minority? Justice Oliver Wendell Holmes reminded us about the occasional difficulty of answering this question when he wrote (United States v. Schwimmer, 1929): "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought that we hate."

An especially poignant example of Holmes's "principle of free thought" was provided in Village of Skokie v. National Socialist Party of America (1978). In this case, the Court decided to permit "followers of Nazism" flaunting the Swastika to publicly assemble to express their thoughts. In this decision, the Court appeared to disregard the

feelings of the majority in a community that included many persons who had suffered unspeakable horrors at the hands of Hitler's followers in Europe.

The "Skokie" case presaged a hot controversy of the 1980s and 1990s about the limits of First Amendment freedoms of speech, press, assembly, and petition, when these rights are used to assault the beliefs and sensitivities of vulnerable minorities -- racial, ethnic, sexual, religious, etc. We are challenged today, as were the people involved in the Skokie case, to decide critical questions about how to balance the private rights of various types of individuals, including some who are hateful (e.g., followers of Nazism), with our sense of the public good.

Should we follow the guidance of Judge Decker (United States Court of Appeals for the Seventh Circuit) in his opinion overruling the Skokie ordinances prohibiting Nazis from publicly assembling to express their heinous views? Decker wrote: "The long list of cases reviewed in this opinion agrees that when a choice must be made, it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on a dangerous course of permitting the government to decide what its citizens must say and hear."

Is Judge Decker right? We shall continue to use our First Amendment freedoms of speech, press, assembly, and petition to respond to this critical issue.

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